90-871

No.

In The
Supreme Court Of The United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT AND GOVERNOR WILLIAM A. O'NEILL,
Petitioners,

v.

MASHANTUCKET PEQUOT TRIBE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the provisions of 25 U.S.C. §§ 2701-2721 (Indian Gaming Regulatory Act) compel a sovereign State to permit commercial casino gambling when the criminal laws and public policy of the State prohibit such gambling, except for a limited statutory variation which permits bona fide charitable groups, under rigid State licensure, to raise funds by operating "Las Vegas Nights" at which imitation money is employed for wagering and merchandise only can be awarded as a prize?

2. Pursuant to the provisions of 25 U.S.C. §§ 2701-2721 (Indian Gaming Regulatory Act), must an Indian Tribe adopt an enabling Tribal Ordinance before the State has an obligation to negotiate a Compact governing Class III gambling activities on the Reservation?

PARTIES

All parties to this action are named in the caption. The petitioners are the State of Connecticut and its Governor, the Honorable William A. O'Neill. The respondent is a federally recognized Indian Tribe with reservation premises located within the geographic boundaries of Connecticut.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported in 913 F.2d 1024 (1989), and a copy is attached hereto at Appendix A-1. The opinion of the United States District Court for the District of Connecticut is reported in 737 F.Supp. 169 (1989), and a copy is attached hereto at Appendix A-2.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and U.S. Supreme Court Rule 10.1(c) because the lower courts have construed a new federal statute (Indian Gaming Regulatory Act) in a manner which vitiates the essential sovereignty of a State to decide, as a matter of public policy, whether a particular form of gambling is to be permitted within its borders. This Court has not yet had the opportunity to review the provisions of the Act which are of critical importance not only to the State of Connecticut but to any other State wherein is located the reservation of a federally recognized Indian Tribe.

The order sought to be reviewed was entered by the United States Court of Appeals for the Second Circuit on September 4, 1990. This petition filed pursuant to 28 U.S.C. § 1254(1) is therefore timely.

STATUTES INVOLVED

25 U.S.C. §§ 2710(b)(1) and (2), in part, provide:

> (b)(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if —
>
> > (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and
> >
> > (B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction. . . .

25 U.S.C. §§ 2710(d)(1), (2), (3) and (7), in part, provide:

(d)(1) Class III gaming activities shall be lawful on Indian lands only if such activities are —

(A) authorized by an ordinance or resolution that —

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(d)(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b).

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that —

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 12(e)(1)(D).

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect. . . .

(d)(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact. . . .

(d)(7)(B)(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction

of such Indian tribe within the 60-day period provided in the order a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures —

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this Act, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

Conn. Gen. Stat. § 7-186a(b), in part, provides:

(b) Any nonprofit organization, association or corporation may promote and operate games of chance to raise funds for the purposes of such organization, association or corporation, provided the sponsoring organization shall have been organized in good faith and actively functioning as a nonprofit organization in this state for a period of not less than two years prior to its application for a permit under the provisions of sections 7-186a to 7-186m, inclusive. . . . No person under the age of eighteen years shall promote, conduct, operate or work at events featuring, or play, such games nor shall any sponsoring organization permit any person under the age of eighteen to so promote, conduct, operate or play such games of chance. All funds derived from such games of chance shall be used exclusively for the purpose stated in the application of the sponsoring orgarization as provided in section 7-186b.

Conn. Gen. Stat. §§ 7-186c(a) and (c), in part, provide:

(a) . . . No more than four permits shall be issued to the same applicant in any twelve-month period and no permit shall be issued to the same applicant within two months from the issuance of a prior permit, except that a second permit may be issued within two months of the issuance of a permit for an event permitted pursuant to subsection (c) of section 7-186a. No game of chance shall be conducted at the same location more than twice within a period of three weeks.

(c) No individual bet or wager shall be made in money. No bet shall be made or accepted using any representation of money which exceeds twenty-five dollars. Only cash shall be used for the purchase of chips or any other representation of money to be used at an event and no credit or representation of credit shall be extended to players at such event. All chips or representations of money to be used at an event shall be counted prior to the event and at the termination of

such event with an accounting thereof certified to under penalty of false statement by the three persons designated in the permit application as being responsible for such games of chance. The three persons so designated shall be the only persons who shall sell or dispense chips or any other representation of money and shall be the only persons who shall redeem such chips or representations of money for prizes or merchandise or goods or for coupons or certificates for such merchandise or goods.

Conn. Gen. Stat. § 7-186d provides:

Any prizes to be awarded for the playing of such games shall be merchandise or goods. Cash prizes shall not be given nor shall any prize be redeemed or redeemable for cash. Coupons or certificates for goods may be issued by the sponsoring organization only. Such coupons or certificates shall contain a notation that such coupons or certificates may not be redeemed for cash money and that redemption of any such coupon or certificate for cash money by any person or organization shall constitute a class A misdemeanor. No person may be awarded a coupon or gift certificate which is redeemable at any business or mercantile establishment where such person is employed or affiliated. Any person or organization who redeems coupons or certificates evidencing a right to receive goods or merchandise issued by a Las Vegas night sponsoring organization for cash or consideration, other than goods or merchandise, shall be guilty of a class A misdemeanor.

Conn. Gen. Stat. § 7-186i, in part, provides:

Any sponsoring organization which holds, operates or conducts any games of chance, and its members who were in charge thereof, shall furnish to the executive director of the division of special revenue and to the chief of police of the municipality or to the first selectman, as the case may be,

a verified statement, showing (1) the amount of the gross receipts derived from each event of such games of chance, (2) each item of expense incurred or paid and each item of expenditure made or to be made and the name and address of each person to whom each such item has been or is to be paid, (3) the net profit derived from each event of such games of chance and the uses to which the net profit has been or is to be applied and (4) a list of prizes of a retail value of fifty dollars or more offered or given with the amount paid for each prize purchased or the retail value for each prize donated and the names and addresses of the persons to whom the prizes were given. . . .

Conn. Gen. Stat. § 7-186*l* provides:

Any person who knowingly violates any provisions of sections 7-186a to 7-186m, inclusive, except sections 7-186d or 7-186e, or who makes any false statement in an application for a permit or in any report required by the provisions of said sections, shall, for a first offense, be fined not more than five hundred dollars or imprisoned not more than ninety days or both and, for a second or subsequent offense, shall be fined not more than one thousand dollars or imprisoned not more than one year or both.

STATEMENT OF THE CASE

The respondent is a federally recognized Indian Tribe (hereinafter, Mashantuckets or Tribe) with a reservation located in Ledyard, Connecticut. Governor William A. O'Neill and Connecticut (hereinafter, State) are the petitioners. In October, 1988, Congress passed, and President Reagan signed, the Indian Gaming Regulatory Act (hereinafter, IGRA), 25 U.S.C. §§ 2701-2721 and 18 U.S.C. §§ 1166-1168.

IGRA was designed by Congress to enable Indian Tribes to operate gambling enterprises upon reservations "as a

means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). The Act, in recognition of the disparity that exists between different forms of gambling, established three categories of activities: Class I gaming, which consists primarily of traditional ceremonial games, the regulation of which is left entirely to the Tribe, 25 U.S.C. § 2710(a)(1); Class II gaming, which consists primarily of bingo and related games, the regulation of which is divided between the Tribe and a new federal agency, the Indian Gaming Regulatory Commission, created by IGRA, 25 U.S.C. §§ 2710(b) and (c); and Class III gaming, which consists of all other forms of gaming, the regulation of which is vested in the Tribe and the State with the allocation of responsibilities to be determined, after negotiations, in a document entitled a Tribal-State Compact. 25 U.S.C. § 2710(d). This case centers on Class III gaming in Connecticut, with a particular focus upon the issue of whether IGRA is to be interpreted as allowing a limited, minor statutory exception to literally consume the general proscription against casino gambling in this State.

Pursuant to IGRA, on March 30, 1989, counsel for the Mashantuckets, in a letter to Governor O'Neill, requested that the State enter into negotiations concerning a Compact "governing the conduct of expanded gaming activities on the Tribe's reservation . . . ." While the State does permit various forms of legalized gambling,[1] it became clear in discussions with the Tribe that its primary, if not exclusive, motivation was to construct and operate a casino upon its reservation. The State responded that since the operation of a casino in Connecticut was not permitted, it would not engage in negotiations designed to legitimatize such an endeavor. The State did offer to engage in "friendly litigation" with the Tribe to seek a resolution of whether casino gambling would be a permissible form of Class III gaming

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[1] State Operated Lottery, Conn. Gen. Stat. § 12-568; State Off-Track Betting, Conn. Gen. Stat. § 12-571; Pari-mutuel Wagering — Jai Alai and Greyhound Racing, Conn. Gen. Stat. § 12-575(a).

in Connecticut under IGRA. This offer was made at a time when the jurisdiction of the federal courts under IGRA did not exist since a mandatory 180-day waiting period of the statute (25 U.S.C. § 2710 (d)(7)(B)) had not expired. The Tribe never responded to this offer.

At the time of the initial request for negotiations, the Tribe had not adopted a tribal ordinance which would permit casino gambling upon the reservation. In fact, to date of this petition, the State has not been notified that such an enabling ordinance has been duly adopted by the Tribe.

On cross-motions for summary judgment, the District Court rendered judgment in favor of the Tribe finding that adoption of a tribal ordinance was not a precondition to negotiations and that casino gambling was a proper subject for negotiations under IGRA. It, therefore, ordered that the Tribe and State conclude a compact within sixty days.[2] On September 4, 1990, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court.

Pursuant to the order of the District Court (both the District Court and the Court of Appeals having denied the State's request for a stay), the State and Tribe have engaged in negotiations resulting in separate proposed compacts which have been submitted to a mediator, selected by agreement of the parties and appointed pursuant to the provisions of IGRA (25 U.S.C. § 2710(d)(7)(B)(iv)) by the District Court. The mediator, on October 22, 1990, has selected the draft compact submitted by the State. The State now has until December 22, 1990, to decide if it will accept the mediator's selection. Failing such an acceptance by the State, the Secretary of the Interior, in consultation with the Tribe, is

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[2] The District Court extended this deadline once and the parties by mutual agreement further extended this deadline so that the eventual date of October 1, 1990, was established as the date for submission of proposed compacts to the mediator.

authorized to promulgate "procedures" under which Class III gaming will be allowed to operate upon the reservation of the Tribe in Connecticut. 25 U.S.C. § 2710(d)(7)(B)(vii).

Obviously then, absent a favorable ruling from this Court, casino gambling will be initiated in Connecticut by the Tribe.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE INDIAN GAMING REGULATORY ACT HAS NOT BEEN DESIGNED TO FORCE A STATE TO PERMIT A FORM OF GAMBLING UPON A RESERVATION WHICH IS NOT A PERMISSIBLE ACTIVITY BY ANY PERSON OR ENTITY AT ANY OTHER LOCATION IN SUCH STATE.

IGRA clearly provides that a Class III gaming activity is lawful on an Indian reservation "only if" such an activity is "located in a State that permits such gaming for any purpose by any person, organization, or entity. . . ." 25 U.S.C. § 2710(d)(1)(B). It is undisputed that the operation of a commercial casino in Connecticut, by any person, would be a violation of the criminal law. *See*, Conn. Gen. Stat. §§ 53-278a through 53-278b.[3] Yet the Tribe argues, and the lower courts concur, that since Connecticut law sanctions the presentation of "Las Vegas Nights," such activity is sufficiently similar to casino gambling as to amount to "such gaming" as that phrase is employed in 25 U.S.C. § 2710(d)(1)(B), and that, therefore, the State must negotiate with the Tribe regarding the construction and operation of a casino on the reservation.

Even a brief look at the Connecticut statutes which permit "Las Vegas Night" activity is a convincing demonstration of the substantive disparity between Las Vegas night activity and a casino. Only a bona fide charitable organization may qualify for a Las Vegas night license, Conn. Gen. Stat. § 7-186a(b); such a license is valid for only the day or days specified in the permit and no more than four licenses

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[3] Conn. Gen. Stat. § 53-278a(3) defines professional gambling, punishable as a class A misdemeanor, as, *inter alia*: ". . . ; maintaining slot machines, . . . , roulette wheels, dice tables, . . . ; and the following shall be presumed to be included: conducting any banking game played with cards, dice or counters, or accepting any fixed share of the stakes therein; . . . .

will be issued to the same organization in any calendar year, Conn. Gen. Stat. § 7-186c(a); cash cannot be employed to place any wager, and cash cannot be awarded as a prize. Conn. Gen. Stat. § 7-186c(c).

Unquestionably, casino type games are conducted under a Las Vegas night permit (i.e., poker, blackjack, roulette, etc.) but imitation money must be employed and only merchandise can be awarded as a prize. Offering cash, or actually awarding it as a prize, is a criminal offense. Conn. Gen. Stat. § 7-186d. Moreover, the cash which is used initially to purchase the imitation money and the merchandise awarded as prizes must be strictly recorded and reported to the licensing agency of the State. Conn. Gen. Stat. § 7-186c(c). Yet the lower courts have found that this type of event, sponsored and run by a nonprofit group in a church basement on a Saturday night, and no-holds barred gambling in a casino like Trump Plaza in Atlantic City, are sufficiently similar so as to amount to "such gaming" as Congress has employed this phrase in IGRA. We submit that such a result is illogical, unintended by Congress, and evidences an utter disregard for the sovereignty of the State and its particular public policy.

Congress was not merely paying lip service to the notion of respect for a State's public policy when, in the "Findings" section of IGRA, it declared that gaming activity upon a reservation will be permissible if it is "conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5).

While Connecticut has legalized some forms of gambling in order to generate much-needed revenue (*see* footnote 1, *infra* at p. 9), the Legislature has consistently refused, even in the face of specific proposals, to legalize casino gambling in this State. Connecticut General Assembly, Legislative Record Index (Final Edition, Regular Sessions, 1981, 1982). Moreover, since 1979, the Legislature, with the concurrence of the Governor, has pointedly and unequivocally determined that there shall be no expansion of legal gambling in this State.

Conn. Gen. Stat. §§ 12-571a, 571b and 574c. These legislative enactments have come to be known as the gambling "moratoria" statutes and have been renewed for two-year periods by every subsequent General Assembly session since 1979, the latest such action having been taken in 1989 (1989 Conn. Pub. Acts No. 89-282; 1989 Conn. Pub. Acts No. 89-290).

Even in the face of this unified Legislative and Gubernatorial declaration that Connecticut does not desire and will not tolerate casino gambling, the lower courts have interpreted IGRA in a manner that literally forces Connecticut to stand aside and witness the arrival of casino gambling. Such an unwelcome incursion, if it is to occur, should happen only because this Court has so ordained, and not simply based upon the decision of the Court of Appeals.

Moreover, the ruling below not only impacts and intrudes upon the sovereign authority of Connecticut, but shall have negative implications upon identical rights of other States. This is the first case, involving the provisions of IGRA and its interaction with State laws, to reach this Court. It will not be the last. Indeed, seven cases[4] have reached various

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[4] As of November 22, 1990, the following cases were filed and pending involving the issues arising under IGRA:

Cabazon Band of Mission Indians v. Deukmejian, et al. (U.S.D.C., E.D. Cal. Cause No. CIV-S-90-1118 MLS-GGH) (Issue: whether § 19596.6 of the Cal. Business and Professions Code is properly applied to the Cabazon Tribe's class III operations).

Sault Ste. Marie Tribe of Chippewa Indians, et al. v. State of Michigan (U.S.D.C., W.D. Mich. Cause No. 1:90 CV 611) (Issue: whether commercial casino gaming is a permissible form of class III activity in Michigan).

Lower Sioux Community of Minnesota v. State of Minnesota (U.S.D.C., 4th Div. Minn. Cause No. 4-89-936) (Issue: whether any form of class III gaming other than video games of chance are permissible topics of compact negotiations in Minnesota).

(continued)

stages of the litigation process in the District Courts which involve the gambling laws of six States and the effect which IGRA has upon the execution of those laws.

IGRA is a new federal enactment never before submitted for this Court's analysis. A persistent issue will center on whether IGRA may, in effect, nullify a State's criminal prohibition of gambling in its many and varied forms. Clearly, the decision of a State regarding gambling (ranging from a total Constitutional ban to full permissibility) is a core State determination, a matter which, the well-established principle of Federalism teaches, must be accorded respectful deference. This then is surely "an important question of federal law which has not been, but should be, settled by this Court, ..." U.S. Supreme Court Rule 10.1(c).

The Court of Appeals ruling below is further deserving of review because its decision: (a) centers on the application of a rigid rule of statutory construction regarding the repetitious use of the phrase "such gaming" to the exclusion of other pertinent statutory language which demands consideration; (b) misapplies this Court's holding in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), and/or

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[4] *(continued)*

Mississippi Band of Choctaw Indians v. State of Mississippi (U.S.D.C., S.D. Mississippi, Jackson Div. Cause No. J90-0386(B)) (Issue: whether the State of Mississippi has negotiated for a class III compact in good faith).

St. Regis Mohawk Tribe v. State of New York (U.S.D.C., S.D.N.Y. Cause No. 90 CIV 5513) (Issue: whether commercial casino gaming is a permissible form of class III activity on the St. Regis Mohawk Reservation in New York).

Lac Du Flambeau Band of Lake Superior Chippewa Indians, et al. v. State of Wisconsin, et al. (U.S.D.C., W.D. Wis. Cause No. 90-C-0408-C) (Issue: scope of required negotiations for class III gaming compact in Wisconsin).

Oneida Tribe of Indians v. State of Wisconsin, et al. (U.S.D.C., W.D. Wis. Cause No. 89-C-916-C, appeal docketed No. 90-3337 (7th Cir. Oct. 17, 1990)) (Issue: whether the State of Wisconsin has negotiated in good faith concerning interpretation of IGRA).

employs the prohibitive/regulatory test of *Cabazon* in circumstances where Congress has not directed its use, and (c) ignores the only portion of IGRA's legislative history which specifically addresses the noncomparability of Las Vegas night activity and casino gambling.

The following statement of Senator McCain, made at the time of final passage of IGRA, reinforces the notion that Congress did not intend to inflict upon the States a gambling activity which is clearly anathema to the public policy of such a State:

> ". . . [W]e [the United States Senate] must ensure that the Indians are given a level playing field in order to install gaming operations that are the same as the States in which they reside and will not be prevented from doing so because of the self-interest of the States in which they reside. . . ."

134 Cong. Rec. S12653 (Daily ed., Sept. 15, 1988) (remarks of Sen. McCain).

If a statutory system such as Connecticut's, where charitable groups, under rigid regulation, are permitted to raise funds but only for their charitable purposes; where wagers are placed upon games of chance customarily associated with a gambling casino, but using imitation money only; where prizes may consist of merchandise only; and where the award of cash as a prize is strictly prohibited, amounting to a criminal offense if offered or received; if the existence of such a system is to be viewed as "such gaming" thereby permitting an Indian tribe to construct and operate a commercial casino enterprise, then what happened to "the level playing field"?

We submit that the consequence of such an interpretation results in an inverted playing field because a tribe would then be free to offer unlimited, high stakes casino gambling in a State where no other person or entity is permitted to offer or present such an activity.

Congress did not intend to deprive a state of its fundamental right to determine if a particular form of gambling

is to be permitted within its borders. Yet the decisions of the lower courts in this case result in just such a deprivation.

II. THE INDIAN GAMING REGULATORY ACT MANDATES THAT BEFORE A SOVEREIGN STATE MAY BE COMPELLED TO ENTER INTO NEGOTIATIONS, A TRIBE MUST FIRST ADOPT AN ENABLING TRIBAL ORDINANCE WHICH SIGNIFIES THAT THE MEMBERS OF THE TRIBE AGREE THAT A CLASS III GAMING ACTIVITY WILL BE SUFFERED UPON THE RESERVATION.

It is undisputed that the Tribe has not adopted a Tribal ordinance which would authorize the exhibition of casino gambling on its reservation.[5] Yet the provisions of IGRA relating to Class III gaming create a sequence of conditions which must be satisfied if the activity is to be "lawful" on the reservation. The first listed condition specifies that the activity (in this case, casino gambling) must be

> (A) authorized by an ordinance or resolution that —
> (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
> (ii) meets the requirements of subsection (b), and
> (iii) is approved by the Chairman.

25 U.S.C. § 2710(d)(1).

The next conditions, listed in order by statute, are a determination of the permissibility of the activity in the State of location and conformity with a Tribal-State compact. 25 U.S.C. §§ 2710(d)(1)(B) & (C).

The State has consistently maintained that any obligation which it may have to honor a Tribe's request for negotiations regarding a compact (25 U.S.C. § 2710(d)(3)(A)) arises only after an ordinance is adopted and approved.

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[5] It is self-evident therefore that no such ordinance has been submitted to the Chairman of the Indian Gaming Commission for his requisite approval.

The Court of Appeals, finding nothing which "requires sequential satisfaction" of the listed requirements, has held that the adoption/approval of the ordinance is not a precondition to the State's obligation to negotiate. The analysis of the Court was faulty and is deserving of this Court's review because the decision: (a) fails to consider the importance Congress attached to the ordinance adoption/approval process which is demonstrated by the detailed and lengthy description of this process throughout the Act (*see, e.g.,* 25 U.S.C. §§ 2710(b), (d) & (e)); (b) neglects to recognize the importance this process occupies in the preservation and protection of the sovereignty bestowed upon the individual Indian tribes by Congress, *United States v. Wheeler,* 435 U.S. 313 (1978); and, (c) considers the provisions relating to a tribe's request for negotiations in isolation from the entire content and tone of the Act and without reference to relevant legislative history.

This decision also has repercussions beyond its impact upon Connecticut, for clearly other States shall be implicated. If the Court of Appeals' decision stands, then these States may be faced with the prospect that a Tribe, without first examining the issue of permitting gambling upon its tribal lands via the ordinance adoption vehicle, may demand and secure negotiations of the State. Thus, important, costly and essential State resources may be diverted to the negotiating task which culminates in a detailed, complex compendium called a Tribal-State Compact.[6] Under the reasoning of the Court of Appeals in this case, the foregoing process, with its attendant mass diversion of State resources, may end up being unnecessary and wasted, since only then must the Tribe decide, in its collective wisdom, if the activity is to be allowed by adopting, or rejecting, an enabling ordinance.

Thus, this issue is of fundamental legal significance since the jurisdiction of the District Court to order the State to begin and conclude negotiations with the Tribe regarding a Compact was founded entirely on the Court's view that adoption/approval of a Tribal ordinance was not a precondition to a valid request for negotiations.

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[6] The proposed compact submitted by the State to the mediator in this case (*see, infra* at p. 10) comprised a document in excess of 290 pages.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully submit that this Petition should be granted and a Writ of Certiorari should issue to review the judgment and opinion of the U.S. Court of Appeals for the Second Circuit.

Respectfully submitted,

Petitioners
State of Connecticut and
Governor William A. O'Neill

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APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1841—August Term, 1989

(Argued: July 18, 1990 Decided: September 4, 1990)

Docket No. 90-7508

MASHANTUCKET PEQUOT TRIBE,

Plaintiff-Appellee.

—v.—

STATE OF CONNECTICUT and WILLIAM A. O'NEILL, GOVERNOR OF THE STATE OF CONNECTICUT,

Defendants-Appellants.

Before:

WINTER, MAHONEY, and WALKER,

Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Connecticut, Peter C. Dorsey, *Judge*, entered May 15, 1990, as modified on June 5, 1990, ordering appellants to enter into good faith nego-

tiations with appellee for the purpose of formulating a tribal-state compact governing the conduct of games of chance at appellee's reservation in Ledyard, Connecticut, and that such compact be concluded within sixty days.

Affirmed.

RICHARD M. SHERIDAN, Assistant Attorney General of the State of Connecticut, Hartford, Conn. (Clarine Nardi Riddle, Attorney General of the State of Connecticut, Robert F. Vacchelli, Carolyn Querijero, Assistant Attorneys General, Hartford, Conn., of counsel), *for Defendants-Appellants.*

BARRY A. MARGOLIN, Portland, Me. (Robert L. Gips, Gregory W. Sample, Tureen & Margolin, Portland, Me., Jackson T. King, Brown, Jacobson, Jewett & Laudone, Mystic, Conn., of counsel), *for Plaintiff-Appellee.*

Richard B. Stewart, Assistant Attorney General of the United States of America, Washington, D.C. (Carol J. Williams, Blake A. Watson, Attorneys, Department of Justice, Washington, D.C., Michael Cox, Department of the Interior, Washington, D.C., of counsel), *for the United States of America, Amicus Curiae.*

Robert K. Corbin, Attorney General of the State of Arizona, Phoenix, Ariz. (Ian A. Macpherson, Phoenix, Ariz., of counsel), *for the states of Arizona and Nevada, Amici Curiae.*

Donald J. Simon, Washington, D.C. (Sonosky, Chambers & Sachse, Washington, D.C., Jerome L. Levine, Neiman, Billet, Albala & Levine, Los Angeles, Cal., James E. Townsend, Minneapolis, Minn., of counsel), *for the National Indian Gaming Association, Amicus Curiae.*

MAHONEY, *Circuit Judge*:

The Indian Gaming Regulatory Act ("IGRA")[1] establishes three classes of gaming activity. The Mashantucket Pequot Tribe (the "Tribe") seeks to operate casino-type games of chance on its reservation located in Ledyard, Connecticut (the "Reservation"). The contemplated games are class III gaming activities, which are allowed only in conformance with a tribal-state compact. Accordingly, the Tribe requested that the State of Connecticut enter into negotiations with the Tribe concerning the formation of a compact. The state refused to negotiate, and when no compact had been completed more than 180 days after the request to negotiate, the Tribe filed this action against the State of Connecticut

1 The IGRA was enacted by Pub. L. No. 100-497, 102 Stat. 2467 (1988), and is codified at 25 U.S.C. §§ 2701-2721 (1988) and 18 U.S.C. §§ 1166-1168 (1988).

and Governor William A. O'Neill (collectively the "State") in the United States District Court for the District of Connecticut pursuant to 25 U.S.C. § 2710(d)(7) (1988). The Tribe sought (1) an order directing the State to conclude within sixty days a tribal-state compact with the Tribe governing the conduct of gaming activities on the Reservation, pursuant to section 2710(d)(7)(B)(iii), and appointing a mediator to resolve any impasse in accordance with section 2710(d)(7)(B)(iv); and (2) a declaratory judgment that the IGRA obliges the State to negotiate in good faith with the Tribe regarding the conduct of gaming activities on the Reservation.

Both sides moved for summary judgment. Agreeing with the Tribe that the only precondition to the State's obligation to negotiate is a request by the Tribe to negotiate in accordance with section 2710(d)(3)(A), the district court granted summary judgment to the Tribe directing the State to enter into good faith negotiations with the Tribe, and directing that the State and the Tribe conclude a tribal-state compact within sixty days.

We affirm.

Background

The IGRA declares its primary purpose to be the provision of "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." § 2702(1). Its enactment followed court decisions upholding the right of tribes to conduct public bingo games on Indian lands. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Barona Group of Capitan Grande Band of Mission Indians v.*

Duffy, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. Unit B 1981), *cert. denied*, 455 U.S. 1020 (1982); *Mashantucket Pequot Tribe v. McGuigan*, 626 F. Supp. 245 (D. Conn. 1986); *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712 (W.D. Wis. 1981).

The IGRA establishes three classes of gaming, which are subject to differing degrees of tribal, state, and federal jurisdiction and regulation. Class I gaming is limited to social games for nominal prizes and traditional tribal ceremonial games, § 2703(6), and is subject only to tribal regulation, § 2710(a)(1). Class II gaming includes bingo and related games, as well as certain nonbanking card games.[2] § 2703(7)(A). Banking card games, electronic games of chance, and slot machines are expressly excluded, § 2703(7)(B), but certain banking card games operated by Indian tribes in certain states on or before May 1, 1988 may be grandfathered as class II gaming, § 2703(7)(C). Class II gaming is generally not subject to state regulation,[3] but is subject to some fed-

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2 "The distinction is between those games where players play against each other rather than the house [(nonbanking card games, *e.g.*, poker)] and those games where players play against the house and the house acts as banker [(banking card games, *e.g.*, blackjack)]." S. Rep. No. 446, 100th Cong., 2nd Sess. 9, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3079 ("Senate Report").

3 Class II gaming may be conducted, however, only "within a State that permits such gaming for any purpose by any person, organization or entity," § 2710(b)(1)(A), and "[a] tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements . . . are at least as restrictive as [applicable] State law governing similar gaming," § 2710(b)(4)(A). In addition, nonbanking card games per-

eral oversight by the National Indian Gaming Commission ("NIGC"), § 2710(b) and (c), in addition to tribal regulation, § 2710(a)(2). All other forms of gaming are classified as class III gaming. § 2703(8).

Under section 2710(d)(1), class III gaming activities are lawful on Indian lands only if such activities are:

> (A) authorized by an ordinance or resolution that—
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> (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
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> (ii) meets the requirements of subsection (b) of this section, and
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> (iii) is approved by the Chairman [of the NIGC],[4]
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> (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and
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> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) [of section 2710(d)] that is in effect.

25 U.S.C. § 2710(d)(1) (1988). A tribal-state compact is "in effect" when "notice of approval by the Secretary [of the Interior] of such compact has been published by the Secretary in the Federal Register." § 2710(d)(3)(B).

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mitted as Class II gaming must be "played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games." § 2703(7)(A)(ii).

4 The first chairman of the NIGC was confirmed by the United States Senate on May 26, 1990.

In sum, class III gaming activities are subject to tribal and state regulation, as provided by a tribal ordinance, a tribal-state compact, and the IGRA.

The Tribe sought to expand its gaming activities to include class III games of chance, such as those activities permitted by Connecticut law for certain nonprofit organizations during "Las Vegas nights." Conn. Gen. Stat. §§ 7-186a to 7-186p (1989).[5] Accordingly, counsel for the Tribe wrote a letter dated March 30, 1989 to the governor of Connecticut, William A. O'Neill, "to request that the State of Connecticut enter into negotiations with the Tribe for the purpose of entering into a Tribal-State compact governing the conduct of expanded gaming activities on the Tribe's reservation in Ledyard [, Connecticut]." By letter dated May 1, 1989, Governor O'Neill responded that he had requested that the State's Acting Attorney General, Clarine Nardi Riddle, review the IGRA and determine the State's obligations thereunder.

By letter dated July 19, 1989, Acting Attorney General Riddle advised the Tribe that the State would not negotiate concerning the operation of games of chance or "Las Vegas nights" on the reservation, since the Tribe only had a "right to conduct 'Las Vegas Nights' on the premises of the reservation subject . . . to those restrictions contained in the Connecticut General Statutes (§ 7-186a, et seq.) and the regulations of the Division of Special Revenue which are generally applicable

5 The games of chance that Connecticut permits at the "Las Vegas nights" include blackjack, poker, dice, money-wheels, roulette, baccarat, chuck-a-luck, pan game, over and under, horse race games, acey-ducey, beat the dealer, and bouncing ball. *See* Division of Special Revenue, Administrative Regulations: Operation and Conduct of Games of Chance § 7-186k-15 (1988).

to those groups authorized to conduct such a form of entertainment." The letter also stated that the State was willing "to negotiate, in good faith, with the Tribe, concerning other permissible forms of gaming in Connecticut," and that Governor O'Neill would "shortly be appointing a task force or negotiating team specifically for this purpose."

By letter dated August 1, 1989, counsel for the Tribe expressed to Acting Attorney General Riddle their pleasure "to hear of the impending appointment of a negotiating team for the State, and [their] hope to meet with [the] negotiating team as soon as possible," while soliciting an expression of the legal analysis underlying the State's view that it was under no obligation to negotiate concerning class III gambling. Responding by letter dated August 23, 1990, Acting Attorney General Riddle offered additional arguments for the State's position, discussed the State's amenability to litigation to resolve the issue, and raised the question whether the Tribe had enacted a gaming ordinance. Despite the State's asserted "readiness to resolve the issue of casino type gambling" on the Reservation, however, prior to this litigation the State never entered into actual negotiations with the Tribe, nor was the Tribe ever advised of the appointment of any negotiating committee by the State.

Section 2710(d)(7)(B)(i) authorizes an Indian tribe to commence an action in district court against a state for failure to negotiate if a 180-day period has elapsed since the tribe requested that the state enter into negotiations. On November 3, 1989, after more than 200 days had elapsed since the Tribe requested negotiations, the Tribe filed its complaint in this action in the United States

District Court for the District of Connecticut, invoking jurisdiction under section 2710(d)(7)(A)(i).

On January 25, 1990, the Tribe moved for summary judgment: (1) declaring that the State is required by the IGRA to negotiate with the Tribe concerning the terms of operation of games of chance on the Reservation, including any rules concerning prizes, wagers and frequency; (2) ordering the State and Tribe to conclude a tribal-state compact governing gaming activities on the Reservation within sixty days pursuant to section 2710(d)(7)(B)(iii); and (3) ordering the appointment of a mediator to resolve any impasse in accordance with section 2710(d)(7)(B)(iv)-(vii).

The State cross-moved for summary judgement on February 23, 1990. The State contended that the district court lacked jurisdiction because the Tribe had not yet adopted a tribal ordinance permitting casino-type gambling on the Reservation, which in the State's view was required by section 2710(d)(1)(A) as a prerequisite to any obligation to negotiate. The State also argued that no comparable class III gaming activity was permitted in the state, as required by section 2710(d)(1)(B).

The Tribe contended that the only precondition to negotiation was a request to negotiate in accordance with section 2710(d)(3)(A), which had been made, and that because the State permitted certain non-profit organizations to conduct "Las Vegas nights," the games of chance the Tribe desired were generally permitted, albeit regulated, within the meaning of section 2710(d)(1)(B).

On May 15, 1990, the district court granted summary judgment in favor of the Tribe and denied the State's

cross-motion. The court ordered the State to "enter into good faith negotiations with the Tribe for the purpose of formulating a Tribal-State compact governing the conduct of games of chance defined in Conn. Gen. Stat. § 7-186a, *et seq.*, on its reservation," and ordered further that the State and the Tribe conclude a tribal-state compact within sixty days of the ruling, in accordance with section 2710(d)(7)(B)(iii). The State appealed to this court on May 25, 1990.

On June 5, 1990, the district court modified its judgment, pursuant to Fed. R. Civ. P. 62(c), to provide that the deadline for conclusion of the Tribal-State compact was extended to within sixty days of June 5, 1990. The district court denied, however, appellants' motion for a stay pending appeal to this court. On June 14, 1990, this court also denied a motion for a stay of the district court order pending appeal, but ordered that the appeal be expedited. At oral argument, this court denied the State's renewed motion to stay the order to negotiate pending the outcome of this appeal, as well as the State's alternative motion that the sixty-day negotiation period be renewed. On August 14, 1990, the district court approved the parties' joint request to extend the negotiation period, setting a new deadline of September 21, 1990.

Discussion

A. *The State's Obligation to Negotiate.*

The State first contends that no obligation to negotiate a compact has yet arisen, because the Tribe has not adopted a tribal ordinance that has been approved by the chairman of the NIGC and authorizes the conduct

of Class III gaming on the Reservation, as required by subparagraph (A) of section 2710(d)(1), and the adoption of such an ordinance is a precondition to the State's obligation to negotiate a tribal-state compact regarding class III gaming. We disagree.

Section 2710(d)(1) on its face lists several conditions that must be satisfied before a tribe can lawfully engage in class III gaming. Although the adoption of an appropriate tribal ordinance is the first requirement set forth in section 2710(d)(1), nothing in that provision requires sequential satisfaction of its requirements, nor does its legislative history suggest that a tribal ordinance must be in place before a state's obligation to negotiate arises. Indeed, section 2710(d)(2)(C) provides that effective with the publication of a tribal ordinance in the Federal Register, "class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe *that is in effect*" (emphasis added), thus suggesting that the consummation of the compact will *precede* enactment of the tribal ordinance.

Moreover, the IGRA plainly requires a state to enter into negotiations with a tribe upon request. Section 2710(d)(3)(A) provides:

> Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, *shall request* the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. *Upon receiving such a request,*

> *the State shall negotiate* with the Indian tribe in good faith to enter into such a compact.

Id. (emphasis added). Further, the IGRA permits a tribe to initiate an action upon the state's failure to negotiate, after a waiting period timed from the date of the request. *See* § 2710(d)(7)(B). Thus, the only condition precedent to negotiation specified by the IGRA is a request by a tribe that a state enter into negotiations.

Finally, the State's argument that the adoption of a tribal ordinance must occur first among the three conditions specified in section 2710(d)(1) because it is listed first (in subparagraph (A)) encounters the obstacle that the condition which is listed second (in subparagraph (B)) will, of necessity, preexist and precede the adoption of a tribal ordinance. Subparagraph (B) requires that the proposed gaming activities be "located in a State that permits such gaming for any purpose by any person, organization, or entity." Obviously, if a state does not permit "such gaming," the matter is at an end, and the adoption of a tribal ordinance will never occur.

For all the foregoing reasons, the district court correctly concluded that the State was required to negotiate with the Tribe upon request.

B. *Gaming Activities Subject to Negotiation.*

The State next contends that the class III gaming as to which the Tribe seeks to negotiate is not gaming that the State "permits . . . for any purpose by any person, organization, or entity" within the meaning of section 2710(d)(1)(B). Specifically, the State argues that its limited authorization of the conduct of "Las Vegas nights" by nonprofit organizations does not amount to a general allowance of "such [casino-type] gaming," within the

contemplation of section 2710(d)(1)(B), as the Tribe would institute; and further that such gaming activity is contrary to the State's public policy. Thus, the State urges, since the condition of subparagraph (B) of section 2710(d)(1) has not been satisfied, the State is not obligated to negotiate the tribal-state compact envisioned by subparagraph (C).

Pursuant to Conn. Gen. Stat. §§ 7-186a to 7-186p (1989), the State sanctions "Las Vegas nights" conducted by "[a]ny nonprofit organization, association or corporation." § 7-186a(a) and (b). Such entities "may promote and operate games of chance to raise funds for the purposes of such organization, association or corporation," § 7-186a(b), subject to specified conditions and limitations as to, *inter alia*, the status of the sponsoring organization, size of wagers, character of prizes, and frequency of operations. The district court concluded that the games of chance that the Tribe seeks to conduct constitute "such gaming" as is permitted by Connecticut law at "Las Vegas nights," and that the Tribe's contemplated activities therefore constituted permissible class III gaming activities in the State. In our view, the district court correctly decided the issue.

At the outset, we note the congressional "find[ing]," set forth in section 2701(5), that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." This declaration is consistent with the Supreme Court's pre-IGRA ruling in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987):

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within [the area] of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory . . . . The shorthand test is whether the conduct at issue violates the State's public policy.

Id. at 209.

Further, the Senate Report specifically adopted the *Cabazon* rationale as interpretive of the requirement in section 2710(b)(1)(A) that class II gaming be "located within a State that permits such gaming for any purpose by any person, organization or entity," declaring (under the heading "Statement of Policy"):

> [T]he Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in *Cabazon*.

Senate Report at 6; *see also United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (8th Cir. 1990) (as to section 2710(b)(1)(A) and class II gaming, "the legislative history reveals that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity.").

We deem this legislative history instructive with respect to the meaning of the identical language in section 2710(d)(1)(B), regarding class III gaming, which we must interpret.[6] "It is a settled principle of statutory construction that '[w]hen the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place.' " *United States v. Nunez*, 573 F.2d 769, 771 (2d Cir.) (quoting *Meyer v. United States*, 175 F.2d 45, 47 (2d Cir. 1949) (quoting *Lewellyn v. Harbison*, 31 F.2d 740, 742 (3d Cir. 1929))), *cert. denied*, 436 U.S. 930 (1978). Although the State correctly points out that this rule has its exceptions, none advanced by the State has any pertinence here.

The State nonetheless contends that the *Cabazon* criminal/prohibitory-civil/regulatory dichotomy should not be employed here, citing *United States v. Dakota*, 796 F.2d 186, 188-89 (6th Cir. 1986), and *United States v. Burns*, 725 F. Supp. 116 (N.D.N.Y. 1989), *appeal pending sub nom. United States v. Cook* (2d Cir. Nos. 90-1070, -1072, -1168, and -1179. *Dakota*, however, was a pre-IGRA case which ruled only "that the criminal/prohibitory-civil/regulatory test is inappropriate to an interpretation of 18 U.S.C. § 1955 [a provision of the Organized Crime Control Act of 1970]." 796 F.2d at 187-88; *see also Cabazon*, 480 U.S. at 213 (construing

6 We agree with the district court that, contrary to the State's contention, no significance should be accorded to the modest difference between the introductory language of section 2710(b)(1) ("An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if . . . . ") and section 2710(d)(1) ("Class III gaming activities shall be lawful on Indian lands only if . . . . ").

Dakota). *Dakota* added that (unlike the IGRA): "18 U.S.C. § 1955 was not enacted for the benefit of Indian tribes." 796 F.2d at 188. *Burns*, like *Dakota*, involved the application of the *Cabazon* test to 18 U.S.C. § 1955 (1988). *See* 725 F. Supp. at 126.

The State's position, furthermore, is in direct opposition to the central premise of the IGRA with respect to class III gaming. The heart of the ultimate legislative compromise regarding class III gaming was described in these terms:

> After lengthy hearings, negotiations and discussions, the Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises such as pari-mutuel horse and dog racing, casino gaming, jai alai and so forth. The Committee notes the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands where, with few exceptions, such laws and regulations do not now apply. The Committee balanced these concerns against the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands. The Committee concluded that the compact process is a viable mechanism for setting [sic] various matters between two equal sovereigns.

Senate Report at 13.

The compact process is therefore to be invoked unless, applying the *Cabazon* test, it is determined that the state, "as a matter of criminal law and public pol-

icy, prohibit[s] [class III] gaming activity." § 2701(5). Absent such a conflict, the interests of the tribe and state are to be reconciled through the negotiation of a compact, and, if negotiations fail to achieve a compact and it is determined that the state did not negotiate in good faith, through the litigation and mediation process prescribed by section 2710(d)(7)(A) and (B).

Under the State's approach, on the contrary, even where a state does not prohibit class III gaming as a matter of criminal law and public policy, an Indian tribe could nonetheless conduct such gaming only in accordance with, and by acceptance of, the entire state corpus of laws and regulations governing such gaming.[7] The compact process that Congress established as the centerpiece of the IGRA's regulation of class III gaming would thus become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible. Congress intended, on the contrary, that:

> Even if a tribe engages in class III gaming pursuant to a compact with the State, it does not necessarily follow that the tribe is subject to the entire body of State law on gaming. The tribe and the State may negotiate terms such as "the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to,

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7 The State's brief and oral argument on appeal make it clear that this is the State's position, as did the letter from Acting Attorney General Riddle to the Tribe's counsel dated July 19, 1989 (Tribe could conduct class III gaming on Reservation only "subject . . . to those restrictions contained in the Connecticut General Statutes (§ 7-186a, et seq.) and the regulations of the Division of Special Revenue which are generally applicable to those groups authorized to conduct such a form of entertainment").

and necessary for, the licensing and regulation of such activity." 25 U.S.C.A. § 2710(d)(3)(C)(i).

Sisseton-Wahpeton, 897 F.2d at 366 n.10.

Finally, in support of its contention that class III gaming should be subjected to the full corpus of state laws and regulations with regard to gambling, the State points to a provision of the IGRA, 18 U.S.C. § 1166(a) (1988), which provides that "all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." That provision expressly excludes from the definition of "gambling" subject to its coverage, however, "(1) class I gaming or class II gaming regulated by the [IGRA], or (2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under [section 2710(d)(8)] that is in effect." § 1166(c).

We accordingly conclude that the district court was correct in applying the *Cabazon* criminal/prohibatory-civil/regulatory test to class III gaming, and next consider whether the district court correctly concluded that Connecticut law regarding such gaming was regulatory rather than prohibitory. We also agree with this ruling.

In *Cabazon*, the Supreme Court found a California statute that allowed some forms of bingo, but not high stakes bingo, to be regulatory in nature, stating: "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we

must conclude that California regulates rather than prohibits gambling in general and bingo in particular." 480 U.S. at 211. In *Sisseton-Wahpeton*, the Eighth Circuit reached a similar conclusion with respect to the permissibility of blackjack as a grandfathered class II activity, reasoning that "many of the forms of gambling permitted by California are also permitted by South Dakota law, e.g., a State lottery, parimutuel horse race betting, and bingo. Consistent with *Cabazon*, we conclude that South Dakota regulates, rather than prohibits, gambling in general and blackjack in particular." 897 F.2d at 368.

So here, the district court concluded, after a careful review of pertinent Connecticut law regarding "Las Vegas nights," that Connecticut "permits games of chance, albeit in a highly regulated form. Thus, such gaming is not totally repugnant to the State's public policy. Connecticut permits other forms of gambling, such as a state-operated lottery, bingo, jai alai and other forms of pari-mutuel betting."

We recognize that *United States v. Dakota*, 666 F. Supp. 989, 997-1000 (W.D. Mich. 1985), *aff'd on other grounds*, 796 F.2d 186 (6th Cir. 1986), and *United States v. Burns*, 725 F. Supp. 116, 126 (N.D.N.Y. 1989), *appeal pending sub. nom. United States v. Cook*, (2d Cir. Nos. 90-1070, -1072, -1168, and -1179, can be cited for the proposition that a state which allows charities to engage in episodic, regulated casino-type gambling may still be deemed to be in a prohibitive, rather than regulatory, posture as to *commercial* casino gambling of the type that the Tribe seeks to operate. Neither of these cases, however, interpreted the IGRA, the pertinent provision of which requires an inquiry whether the affected

state "permits such gaming for *any* purpose by *any* person, organization, or entity." § 2710(d)(1)(B) (emphasis added). Construing this provision in light of *Cabazon* and *Sisseton-Wahpeton*, we conclude, in agreement with the district court, that the Connecticut law applicable to class III gaming is regulatory rather than prohibitive.

This ruling means only that the State must negotiate with the Tribe concerning the conduct of casino-type games of chance at the Reservation. We necessarily leave to those negotiations the determination whether and to what extent the regulatory framework under which such games of chance are currently permitted in the State shall apply on the Reservation.

C. The Negotiation Mandate.

Finally, the State contends that under the admittedly mandatory provision of section 2710(d)(7)(B)(iii), the district court is required to order the State and the Tribe to conclude a tribal-state compact within sixty days only if it finds that "the State has failed to negotiate in good faith with the Indian tribe," *id.*, with respect to such a compact. Maintaining that the court below "nowhere found that the State had failed to negotiate in good faith," the State argues that the district court's order directing the conclusion of a compact within sixty days must be reversed.

The district court made no express finding as to the State's lack of good faith, probably because the State did not raise the issue below. As the district court noted in its Ruling on Motion for Stay of Judgment, the State "did not specifically object to the sixty-day requirement or assert that it was not applicable in this instance."

Thus, the issue was not preserved for appeal. *See Radix Org., Inc. v. Mack Trucks, Inc.*, 602 F.2d 45, 48 (2d Cir. 1979). In any event, the State's contention fails on the merits.

First, despite the absence of an explicit finding as to the State's good faith, the district court substantially addressed that issue. The court (1) noted at the outset of its Ruling on Cross-Motions for Summary Judgment that "[the Tribe] asserts that the State has not appointed [a negotiating] team nor commenced negotiations and that over six months has [sic] elapsed since [the Tribe's] request [to negotiate];" (2) addressed in that opinion the central issue whether the State was obligated to negotiate in good faith; and (3) entered a judgment directing the State to "enter into good faith negotiations with the Tribe."

Furthermore, the jurisdictional provision of the IGRA vests jurisdiction in district courts over "any cause of action . . . arising from the failure of a State to enter into negotiations . . . *or* to conduct such negotiations in good faith." § 2710(d)(7)(A)(i) (emphasis added). In addition, section 2710(d)(7)(B)(ii) provides that:

> [U]pon the introduction of evidence by an Indian tribe that—
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> (I) a Tribal-State compact had not been entered into . . . , and
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> (II) the State did not respond to the request of the Indian tribe to negotiate such a compact *or* did not respond to such request in good faith,
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> the burden of proof shall be upon the State to prove that the State *has negotiated with the Indian*

tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

25 U.S.C. § 2710(d)(7)(B)(ii) (1988) (emphasis added).

When a state wholly fails to negotiate, as did Connecticut in the instant case, it obviously cannot meet its burden of proof to show that it negotiated in good faith. *See NLRB v. Katz*, 369 U.S. 736, 743 (1962) ("there is no occasion to consider the issue of good faith if a party has refused even to negotiate").

The State's protestations that its failure to negotiate resulted from sincerely held views as to the meaning of the IGRA, and that it declared its willingness to resolve these legal issues of first impression by litigation, do not alter the outcome. The statutory terms are clear, and provide no exception for sincere but erroneous legal analyses. Further, the manifest purpose of the statute is to move negotiations toward a resolution where a state either fails to negotiate, or fails to negotiate in good faith, for 180 days after a tribal request to negotiate. The delay is hardly ameloriated because the state's refusal to negotiate is not malicious.

Conclusion

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

MASHANTUCKET PEQUOT TRIBE :

—vs— : Civil No. H-89-717 (PCD)

STATE OF CONNECTICUT, et al. :

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiff sues under the Indian Gaming Regulation Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*,[1] and now moves for summary judgment: (1) ordering the State, as required by IGRA, to negotiate with the Tribe concerning the terms of operation of games of chance, as defined by Conn. Gen. Stat. § 7-186a, *et seq.*, on the Reservation, including any rules concerning prizes, wagers and frequency; (2) ordering the State and Tribe to conclude a Tribal-State compact governing gaming activities on the Reservation within sixty days of the date of this order pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii) and to appoint a mediator to resolve any impasse in accordance with 25 U.S.C. § 2710(d)(7)(B)(iv).

Defendants cross-move arguing that this court lacks jurisdiction to entertain the present action since the Tribe has failed to adopt a tribal ordinance which would permit casino-type gambling upon the reservation. Defendants also contend that the "Las Vegas nights" which the State permits non-profit organizations to conduct are not comparable to

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[1] District courts have jurisdiction over a cause of action by an Indian tribe alleging the failure of a State (a) to negotiate with the Tribe for the purpose of forming a Tribal-State compact or (b) to conduct such negotiations in good faith. 25 U.S.C. § 2710(d)(7)(A)(i).

casino-type gambling and hence are not permissible Class III gambling activity pursuant to 25 U.S.C. § 2710(d)(1)(B).

Background

On March 30, 1989, the Tribe requested Governor O'Neill to enter negotiations for the purposes of forming a Tribal-State compact governing gaming activities on the Tribe's reservation pursuant to IGRA. On May 1, 1989, the Governor responded that he had requested the State's Acting Attorney General to review IGRA and determine the State's obligations thereunder.

The State permits certain types of organizations to conduct games of chance at Las Vegas nights subject to the restrictions in Conn. Gen. Stat. § 7-186a, *et seq.* On July 19, 1989, Acting Attorney General Riddle advised that the fact that Connecticut permits Las Vegas nights does not compel it to negotiate with the Tribe under IGRA when the ultimate purpose is construction and operation of a casino.[2] The State recognized its responsibility under IGRA to negotiate in good faith concerning other forms of gaming permitted in Connecticut and did not dispute the Tribe's right to conduct Las Vegas nights subject to statutory and regulatory restrictions. She also noted that the Governor would shortly appoint a task force or negotiating team for that purpose.

Plaintiff asserts that the State has not appointed such a team nor commenced negotiations and that over six months has elapsed since its request. The State contends that it is under no obligation to enter into negotiations until plaintiff adopts a tribal ordinance governing its proposed gaming activities. The State also asserts that it "would gladly participate in 'friendly' litigation designed to secure a federal court declaration of the permissibility of casino gambling on the reservation."

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[2] Plaintiff seeks a compact permitting the Tribe to expand its high-stakes bingo to games of chance without the wager and prize limits imposed by state law. Exhibit C to Plaintiff's Motion.

Discussion

IGRA defines the rights of Indian tribal governments to conduct gaming activities on their reservations. The Act settled the legislative debate which followed court decisions upholding the right of tribes to conduct public bingo games on Indian lands. *See California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987); *Mashantucket Pequot Tribe v. McGuigan,* 626 F.Supp. 245 (D.Conn. 1986); *Barona Group of Capitan Grande Band of Mission Indians v. Duffy,* 694 F.2d 1185, 1187 (9th Cir. 1982), *cert. denied,* 461 U.S. 929 (1983); *Seminole Tribe v. Butterworth,* 658 F.2d 310, 313 (5th Cir. 1981), *cert. denied,* 455 U.S. 1020 (1982); *Oneida Tribe of Indians v. Wisconsin,* 518 F.Supp. 712, 720 (W.D. Wis. 1981). IGRA provides that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5).

IGRA establishes three classes of gaming which are subject to differing degrees of federal, state, and tribal regulation. Class I gaming is limited to social games, either ceremonial or for nominal prizes, 25 U.S.C. § 2703(6), and is free of all outside regulation. *Id.,* § 2710(a)(1). Class II gaming includes bingo and related games, as well as certain non-banking card games, i.e., games played against other players as opposed to the house. *Id.,* § 2703(7). These games are free of state regulation but subject to some federal oversight by the National Indian Gaming Commission ("NIGC"). *Id.,* §§ 2710(b), (c).

All other forms of gaming are classified as class III gaming. 25 U.S.C. § 2703(8). Class III gaming activities are lawful on Indian lands only if such activities are:

> (A) authorized by an ordinance or resolution that —
> (i) is adopted by the governing body of the Indian

tribe having jurisdiction over such lands, (ii) meets the requirements of subsection (b) of this section, and (iii) is approved by the Chairman [of the NIGC], (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

25 U.S.C. § 2710(d)(1).

A. State's Obligation to Negotiate in Good Faith

In its first claim for relief, plaintiff contends that "[t]he State's failure to negotiate in good faith to conclude a Tribal-State compact governing the conduct of gaming activities violates [IGRA]." Complaint, ¶ 13. IGRA provides that any tribe having jurisdiction over lands upon which class III gaming is to be conducted shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a compact governing such gaming and that, upon receiving such request, the State shall negotiate with the tribe in good faith to enter into such a compact. 25 U.S.C. § 2710(d)(3)(A).

It is undisputed that plaintiff, on March 30, 1989, requested the State to enter into negotiations under IGRA. A tribe may not initiate a cause of action for a State's failure to negotiate until 180 days after it requested the State to enter negotiations. 25 U.S.C. § 2710(d)(7)(B)(i). Plaintiff filed its complaint on November 3, 1989, over two hundred days after its request. If the court finds that the State has failed to negotiate in good faith, it shall order the State and tribe to conclude a compact within sixty days or, in the event of an impasse, submit the dispute to a court-appointed mediator. *Id.*, § 2710(d)(7).

The parties dispute whether plaintiff's March 30, 1989 letter triggered the State's obligation to enter into compact negotiations. The State argues that no obligation arose, despite the request, until the tribe adopted an ordinance permitting the type of gambling proposed upon its lands, in this instance casino gambling, and obtained the approval of the Chairman of NIGC. The State argues that the plain language of IGRA establishes the order in which the prerequisites to class III gaming must occur, i.e., authorization under a tribal ordinance; location in a permitting state; and conduct under a Tribal-State compact. 25 U.S.C. § 2710(d)(1). Plaintiff argues that IGRA sets no pre-condition for negotiations other than a tribal request, as it flatly states that, upon receiving a request, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." *Id.*, § 2710(d)(3)(A).

The State's argument that a tribal ordinance is a condition precedent to any obligations to negotiation a compact covering class III gaming is based on § 2710(d)(1). This section, however, does not articulate any time sequence. It sets forth three conditions for class III gaming to be lawful on Indian lands. That a tribal ordinance is listed first, as a requirement, does not establish it as a precondition to compact negotiations. Further, § 2710(d)(2)(C) provides that, even with publication of a tribal ordinance approved by the Commissioner, class III gaming activity shall be fully subject to the terms and conditions of the compact. IGRA does not expressly precondition compact negotiations on publication of an effective tribal ordinance.

Second, the State contends that absent an enabling ordinance, a request for negotiation produces an incongruous result. The State argues that it should not be compelled to expend resources in negotiation only to have the tribe's governing body fail to adopt an ordinance approving all or the particular form of class III gaming contemplated in the

negotiated compact.[3] Adoption of an ordinance as a precondition to any negotiations would encourage the Tribe to adopt an ordinance authorizing all forms of class III gaming to avoid limiting its bargaining position. Plaintiff asserts that it sought to negotiate a compact consistent with its objectives, and which at the same time would accommodate the State's concerns. Plaintiff argues that an appropriate ordinance cannot be framed until it knows the type and scale of gaming to which the state would agree and the relative jurisdictional roles to be played by the Tribe and the State.

The State does not offer any reason why the plain language of IGRA, which requires the State to enter negotiations based solely upon a tribal request, should be ignored. Nowhere does IGRA require, either expressly or implicitly, that an ordinance be adopted and approved prior to compact negotiations. Upon receiving a request to enter into compact negotiations, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A). The obligation to negotiate cannot be more plain or unconditioned.

The State contends that treating the ordinance requirement as a precondition to compact negotiations will ensure that any request to negotiate is received from an authorized representative of the tribe. The State does not contend nor show that there is any lack of authority in this instance. Further, the State has ample methods to ensure that a request validly invokes IGRA and constitutes the authorized request of the tribal council. An ordinance is not the only manifestation of a tribe's genuine request for compact negotiations. This State argument is meritless.

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[3] IGRA expressly authorizes the governing body of the Tribe to adopt an ordinance or resolution revoking any prior authorization of class III gaming thus rendering such activity illegal on tribal lands. 25 U.S.C. § 2710(d)(2)(D). Thus, even under the State's concept of the sequence of the requisite steps, the State could negotiate a compact which could be rendered meaningless by subsequent tribal action.

Congress is thus found to have defined unambiguously a single precursor to the State's obligation to enter compact negotiations, i.e., a request from the tribe. 25 U.S.C. § 2710(d)(3)(A). Neither the language of nor congressional intent underlying IGRA warrant finding an additional precondition to negotiation. Accordingly, plaintiff's motion for summary judgment is granted as to its first claim for relief and defendants' cross-motion is denied.

B. Scope of Negotiations

The parties cross-move for declaratory relief as to whether the State is obligated to negotiate in good faith regarding the conduct of games of chance, as defined by Conn. Gen. Stat. § 7-186a, *et seq.*, including the days and hours of operation, types of wagers, and wager and pot limits. IGRA provides that, in the event of an impasse in compact negotiations, the parties shall submit their last best offer to a court-appointed mediator for his selection of the one "which best comports with the terms of [IGRA] and any other applicable federal law and with the findings and order of the court." 25 U.S.C. § 2710(d)(7)(B)(iv). Plaintiff argues that the court can thus provide guidance to the mediator on relevant issues and that such guidance will reduce the likelihood of an impasse. Since both parties seek declaratory relief on the same issue and "the controversy is definite and concrete, touching the legal relations of parties having adverse legal interest," declaratory relief is appropriate. *Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S. 227, 240-41 (1937).

Plaintiff seeks a declaration that the State must negotiate the conduct of games of chance, commonly referred to as "Las Vegas nights", to be conducted on the reservation. The issue presented is "whether the State can impose *all* of the restrictions imposed on charitable Las Vegas nights on tribal games of chance, without *any* negotiations." Plaintiff's Reply Memorandum at 10. The State asserts that it is not obliged to negotiate the scope of such games of chance

to be conducted on the reservation since it does not generally permit "such gaming."

IGRA permits a tribe to conduct class III gaming if, among other requirements, it is "located in a state that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B). Connecticut permits "[a]ny nonprofit organization, association or corporation [to] promote and operate games of chance [or Las Vegas nights] to raise funds for the purposes of such organization" subject to certain limitations and restrictions, such as limits on the size of wagers, character of prizes, and frequency of operation. *See* Conn. Gen. Stat. § 7-186a, *et seq.;* Conn. Agencies Regs. § 7-186k-1, *et seq.* Plaintiff contends that, since Las Vegas nights are permitted by the State, they fall within the "such gaming" language of IGRA and that therefore the State is obligated to negotiate the terms of a Tribal-State compact permitting the tribe to operate such games of chance. 25 U.S.C. § 2710(d)(3)(A). "In practical terms, the question is whether the Tribe can bargain for higher prize and bet limits and more frequent operation of the same types of games employed at Las Vegas nights, so as to enhance the utility of this form of gaming as a source of revenue." Plaintiff's Memorandum at 14-15.

The State argues that the use of the phrase "such gaming" as opposed to "such *type* of gaming" evidences the intent of Congress that, with regard to class III gaming, only the actual forms of gambling which the State has legalized need to be the subject of compact negotiations. Further, the State asserts that its interpretation is supported by the congressional findings prefacing IGRA that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5). The State argues that if the restrictions it has imposed on Las Vegas nights are removed, such gaming becomes professional gambling which

is prohibited in Connecticut as a matter of criminal law and public policy.

In interpreting the "such gaming" language of IGRA, the "starting point as in all cases involving statutory interpretation, 'must be the language employed by Congress.' " *United States v. Goodyear Tire & Rubber Co.*, 110 S.Ct. 462, 467 (1989), quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Where the plain language is not instructive, a review of legislative history can shed light on Congressional intent. Further, "when the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place." *United States v. Nunez*, 573 F.2d 769, 771 (2d Cir. 1978).

Congress used nearly identical language in defining the prerequisites to both class II and III gaming. *Compare* 25 U.S.C. § 2710(b)(1)(A) *with* 25 U.S.C. § 2710(d)(1)(B). Both classes are permissible on Indian lands if "located [within, § 2710(b)(1)(A), or in, § 2710(d)(1)(B),] a State that permits such gaming for any purpose by any person, organization or entity." Plaintiff points to the analysis underlying a pre-IGRA line of cases holding tribal bingo games to be lawful in states which permit but regulate charitable bingo. *See, e.g., Cabazon*, 480 U.S. 202. The legislative history notes that the provisions regarding class II gaming, primarily bingo, were intended to be consistent with the tribal rights recognized in *Cabazon*. S. Rep. No. 100-446, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. and Admin. News 3071, 3079.

In *Cabazon*, the Tribe operated public bingo games, as well as a card club, on its reservation. The State sought to bar Tribal bingo relying on a statute which permitted bingo only when conducted by a charitable organization and operated by its members on a voluntary basis, required that profits be segregated and used solely for charitable purposes, and imposed prize limits. The court applied a regulatory/prohibitory analysis and held that tribes have a right to

conduct gaming on Indian lands without state regulation if located in a state which permits, subject to regulation, the gaming. *Cabazon*, 480 U.S. at 209–10. The "shorthand test" was "whether the conduct at issue violates the State's public policy." *Id.* at 209. The court rejected California's contention "that high stakes, *unregulated* bingo, the conduct which attracts organized crime, is a misdemeanor in California and may be prohibited on Indian reservations" and held that tribes have a right to conduct gaming on Indian lands without state regulation if located in a state which regulates rather than prohibits the gaming in issue. *Id.* at 210–11.[4] In enacting IGRA, Congress anticipated "that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed[, i.e., located within a State which permits such gaming, § 2710(b)(1)(A)] in certain States." S. Rep. No. 100-446, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. and Admin. News 3071, 3076.

The State contends that Congress has restricted use of the *Cabazon* analysis to questions regarding class II gaming. It also contends that Congress has itself recognized that class III gaming was to be accorded substantially different treatment.[5] Although Congress did employ a different balance of

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[4] In *Cabazon*, the state did not prohibit all forms of gambling and, in fact, encouraged its citizens to participate in a daily state-run lottery. "In light of the fact that California permits a substantial amount of gambling activity, including bingo, . . . [the court] conclude[d] that California regulates rather than prohibits gambling in general and bingo in particular." 480 U.S. at 211.

[5] The State also contends that the different prefatory language of the requirements with respect to class II and class III gaming must be considered in determining whether to apply similar statutory constructions. With respect to class II gaming, IGRA provides that "[a]n Indian tribe may engage in" class II gaming subject to two prerequisites. 25 U.S.C. § 2710(b)(1). The State contends that this is a clear, affirmative grant of

(continued)

federal, state, and tribal oversight with respect to class III gaming, both class II and III gaming are made contingent on a common requirement, i.e., location in a State that permits such gaming. That Congress used nearly identical language evidences an intent that the two be afforded the same construction. Accordingly, opinions construing the term "such gaming" in § 2710(b)(1)(A) can provide guidance in interpreting the same term in § 2710(d)(1)(B).

In *United States v. Sisseton-Wahpeton Sioux Tribe ("SWST")*, 897 F.2d 358 (8th Cir. 1990), the question was whether a blackjack game operated by a tribe was lawful as located within a state permitting such gaming. The blackjack, which was permitted under state law, was subject to a $5 bet limit. The district court held that the tribe's blackjack game, which allowed bets of up to $100, was a different type of gaming than that statutorily permitted and thus did not satisfy the requirement that it be conducted in a state which permits such gaming. *Sisseton-Wahpeton Sioux Tribe ("SWST") v. United States*, 718 F. Supp. 755, 758 (D.S.D. 1989). The district court noted that "if a non-Indian within a state can engage in the particular type of gaming venture, then an Indian tribe in that state may also pursue the same endeavor." *SWST*, 718 F. Supp. at 758. The eighth circuit reversed holding that "Congress intended that class II gaming be subject to tribal and federal oversight, and that the states' regulatory role be limited to overseeing class III

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[5] *(continued)*
authority to the tribe to conduct such gaming, which contrasts decidedly with the prefatory language to the requirements for class III gaming which provides that such gaming "shall be lawful on Indian lands only if" certain preconditions are met. *Id.*, § 2710(d)(1).

While the prefatory language is distinct and must be considered, it does not provide, nor does there appear to be, a reason why the different prefatory language warrants different constructions of the identical "permits such gaming" requirement. The different prefatory language merely recognizes the additional requirement with respect to class III gaming that it is lawful only if conducted in accordance with a Tribal-State compact.

gaming, pursuant to a Tribal-State compact." *SWST*, 897 F.2d at 364. The court reasoned that permitting the State to apply its substantive law to class II gaming would conflict with IGRA's statutory scheme. *Id.*

Plaintiff here does not contend that it should be free to operate games of chance without State oversight. Rather it argues that any proposed games of chance on the reservation should not automatically be subject to all the restrictions imposed on Las Vegas nights by the state law but that IGRA requires the State to bargain with the Tribe over the scope of tribal gaming operations and the extent of State jurisdiction over such gaming.

In *SWST*, 897 F.2d at 364, the government argued that, with respect to either class II or III gaming, state law may supply substantive regulations on gaming. IGRA's requirement that the State permit such gaming was noted to be an "instance of Congress assimilating state law by reference." *Id.* Since the state's regulatory role with respect to class III gaming is limited to oversight pursuant to a Tribal-State compact, the court found application of state substantive law to conflict with IGRA's purpose. *Id.* The court rejected the state's argument on the basis that IGRA "contains no explicit abrogation of the right of tribes to conduct gaming without being subject to state regulation if the tribe is located in a state which regulates but does not prohibit gaming." *Id.* at 366.

The legislative history recites that "[t]he mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact . . . S.555 [does not] contemplate the extension of State jurisdiction or the application of State laws for any other purpose." S. Rep. No. 100-446, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. and Admin. News 3071, 3075–76. "Even if a tribe engages in class III gaming pursuant to a compact with the State, it does not

necessarily follow that the tribe is subject to the entire body of state law on gaming." *SWST*, 897 F.2d at 366 n.10. IGRA contemplates compact negotiations regarding "the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity." 25 U.S.C. § 2710(d)(3)(C)(i). Further, "state law on periods of operation is not necessarily imposed even upon class III gaming; rather, it is subject to negotiation." *SWST*, 897 F.2d at 367 n.11; *see also* S. Rep. No. 100-446, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. and Admin. News 3071, 3084 (compact negotiations may include agreements on days and hours of operation, wage and pot limits, types of wagers, and size and capacity of the proposed facility).

The determinative issue is whether Connecticut law governing "Las Vegas nights" is prohibitory, or merely regulatory. Section 7-186a(b), Conn. Gen. Stat., permits certain nonprofit organizations to operate games of chance for charitable purposes. The regulations list the permissible games to include blackjack, poker, dice, roulette, baccarat and other common casino games. Conn. Agencies Reg. § 7-186k-15. The nonprofit organization must have been in existence for two years and that the promotion and operation of the games must be conducted only by members of the group on a voluntary, nonremunerative basis. Conn. Gen. Stat. § 7-186a(b). No persons under 18 may conduct, operate or play such games and all funds derived must be used for the purposes of the sponsoring organization. *Id.* The state also imposes wager and prize limits: wagers cannot be made in money but only in chips or representations of money purchased for cash; a twenty-five dollar bet limit is imposed; winnings are only redeemable for prizes, merchandise, or goods, or for coupons or certificates for such merchandise or goods. Conn. Gen. Stat. § 7-186c(c). Criminal penalties are provided for violations — maximum $500 fine and/or 90 days for first offense; $1000 fine and/or one year for subsequent offenses. *Id.*, § 7-186*l*. The receipt of Las Vegas night proceeds, other than a fixed rental fee, by a dealer in gaming equipment is considered profes-

sional gambling. Conn. Gen. Stat. § 53-278a(3), and prohibited by Conn. Gen. Stat. § 53-278b(b). Conn. Gen. Stat. § 7-186e.

The State argues that "Las Vegas nights" are not akin to commercial casino-type gambling which is not permitted in Connecticut. *See United States v. Dakota*, 796 F.2d 186, 189 n.4 (6th Cir. 1986) (recognizing distinction between commercial casino gambling and charitable "millionaire parties"). However, this argument would impermissibly subject plaintiff to the full extent of Las Vegas night regulation without negotiation. Games of chance are not prohibited in Connecticut. They are permitted but subject to extensive regulation and limitation. That a violation of the regulations may result in penal sanctions does not make them prohibitory. *See McGuigan*, 626 F. Supp. at 249.

The type of gaming permitted is identified by the type of play permitted, not by bet, frequency, and prize limits. The statute at issue in *Cabazon* permitted bingo only when conducted by a charitable organization subject to the limitations that profits be used solely for charitable purposes and prizes not exceed $250 per game. 480 U.S. at 205. Violation of these provisions constituted a misdemeanor. The tribes engaged in unregulated, high stakes bingo. Nonetheless, the state was held to have no authority to apply its bingo ordinances to tribal bingo because such gaming was regulated not prohibited. *Id.* at 210–11. Similarly, in *SWST*, 897 F.2d 358, the fact of a significantly higher bet limit than the law permitted was held not to make the tribe's blackjack game a different type of gambling for IGRA purposes than what was authorized by state law.

Connecticut permits games of chance, albeit in a highly regulated form. Thus, such gaming is not totally repugnant to the State's public policy. Connecticut permits other forms of gambling, such as a state-operated lottery, bingo, jai alai and other forms of pari-mutuel betting. High amounts may be bet and substantial winnings are permitted. Connecticut "regulates, rather than prohibits, gambling in general and

[games of chance] in particular." *SWST*, 897 F.2d at 368. "[T]he legislative history reveals that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity." *Id.* at 365. IGRA balances the Tribe's autonomy as a sovereign and the State's regulatory interest over gaming operations within its borders. These interests are accommodated by requiring negotiations aimed at a Tribal-State compact governing the conduct of class III gaming activities. *See* S. Rep. No. 100-446, 100th Cong., 2d Sess., 1988 U.S. Code Cong. and Admin. News 3071, 3083 ("[B]oth State and tribal governments have significant governmental interests in the conduct of class III gaming [and] are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe and States.").

Accordingly, plaintiff's request for negotiation meets IGRA's requirement. The class III gaming which plaintiff wishes to conduct is "such gaming" as the state permits and is "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(b)(1)(A). Plaintiff's motion for summary judgment on its second claim for relief is granted and defendants' cross-motion is denied.

Judgment shall enter for plaintiff:

1. Declaring that the State shall enter into good faith negotiations with the Tribe for the purpose of formulating a Tribal-State compact governing the conduct of games of chance defined in Conn. Gen. Stat. § 7-186a, *et seq.*, on its reservation.

2. Ordering that the State and the Tribe conclude a Tribal-State compact within sixty (60) days of this ruling. 25 U.S.C. § 2710(d)(7)(B)(iii).

SO ORDERED.

Dated at Hartford, Connecticut, this 15th day of May, 1990.

/s/ Peter C. Dorsey
Peter C. Dorsey
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

MASHANTUCKET PEQUOT TRIBE	)	
	)	
VS.	)	CIVIL H-89-717 PCD
	)	
STATE OF CONNECTICUT, ET AL.	)	

JUDGMENT

This action having come on for consideration of the cross-motions for summary judgment before the Honorable Peter C. Dorsey, United States District Judge, and

The Court having considered the full record of the case including applicable principles of law, and the Court having its filed its Ruling on Cross-Motions for Summary Judgment, granting the plaintiff's motion on its second claim for relief and denying the defendants' cross-motion,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the plaintiff in accordance with the Court's Ruling on Cross-Motions for Summary Judgment dated May 15, 1990.

Dated at Hartford, Connecticut, this 15th day of May 1990.

KEVIN F. ROWE, Clerk

By /s/ Dennis P. Iavarone
Dennis P. Iavarone
Deputy in Charge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

MASHANTUCKET PEQUOT TRIBE	)	
	)	
VS.	)	CIVIL H-89-717 PCD
	)	
STATE OF CONNECTICUT, et al.	)	

MODIFIED JUDGMENT

This action having come on for consideration of the defendants motion for stay of judgment pursuant to Fed. R. Civ. P. 62(c) before the Honorable Peter C. Dorsey, United States District Judge, and

The Court having considered the full record of the case including applicable principles of law, and the Court having filed its Ruling on Motion for Stay of Judgment, denying the motion bu modifying the judgment as follows: the State and the Tribe are hereby ordered to conclude Tribal-State compact within sixty (60) days of this ruling,

It is accordingly ORDERED, ADJUDGED and DECREED that the judgment be and is hereby entered modified ordering the State and the Tribe to conclude a Tribal-State compact within sixty (60) days.

Dated at Hartford, Connecticut, this 5th day of June, 1990.

KEVIN F. ROWE, Clerk

By /s/ Dennis P. Iavarone
Dennis P. Iavarone
Deputy in Charge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

RECEIVED JUN 4 1990

MASHANTUCKET PEQUOT TRIBE	:	
	:	
—vs—	:	Civil No. H-89-717 (PCD)
	:	
STATE OF CONNECTICUT, et al.	:	

RULING ON MOTION FOR STAY OF JUDGMENT

Defendants move under Fed. R. Civ. P. 62(c) to stay the judgment entered by this court on May 15, 1990 pending an appeal to the Second Circuit. That judgment ordered the State to enter into good faith negotiations with the Tribe for the purpose of formulating a Tribal-State compact governing the conduct of games of chance defined in Conn. Gen. Stat. § 7-186a, *et seq.*, on its reservation and that the parties conclude such a compact within sixty (60) days of this ruling. 25 U.S.C. § 2710(d)(7)(B)(iii).

Issuance of a stay pending appeal under Rule 62(c) is discretionary and equitable, requiring the court to balance the following factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the prevailing party; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1986); *Hayes v. City University of New York*, 503 F. Supp. 946, 962 (S.D.N.Y. 1980), *aff'd*, 648 F.2d 110 (2d Cir. 1981).

The Second Circuit has held that a movant need only demonstrate a "substantial possibility" of success on appeal. *Dubose v. Pierce*, 761 F.2d 913, 920 (2d Cir. 1985). This is based on the difficulty inherent in the post-judgment context

of convincing a judge who has not ruled in your favor that you are likely to be successful on appeal. *Hayes*, 503 F. Supp. at 963 (a party seeking a stay pending appeal is required to show only that its arguments raise a substantial possibility of success). The court should look to "external, preferably objective, indicia of the accuracy of his judgment" such as the extent the challenged decision is supported by precedent; and the standard of review that will govern on appeal. *Id.*

Defendants note that IGRA is a complex statutory compromise between competing sovereign interests and that the issues involved have never been interpreted at the appellate level with respect to class III gaming. Absent definitive appellate guidance and given the dearth of case law construing IGRA (enacted Oct. 17, 1988), this court recognizes that "it is operating in an area of uncertainty." *Hayes*, 503 F. Supp. at 963. However, while defendants' arguments are far from frivolous and present a question deserving of appellate consideration, they have not shown a "substantial possibility" of success. Defendants offer nothing beyond their assertion that it is "virtually impossible to predict the probability that either side will prevail." Defendants' Memorandum in Support at 3.

Defendants assert that the State will be irreparably harmed if it is forced to expend time, effort and finance on negotiations which are to result in the conclusion of a Tribal-State compact by July 15, 1990 before the Second Circuit rules that IGRA mandates such a result. William Drakeley, Deputy Executive Director of the Division of Special Revenue, asserts that the State's lack of experience in regulating class III gaming would make negotiations "a great burden on State finances, resources and personnel, and will require an effort of major and perhaps unreachable proportions."

Plaintiff contends that the order only requires the State to engage in good faith bargaining and that several more steps would be required before the Tribe could commence any class III gaming, i.e., a compact must be concluded and approved

by the Secretary and notice published in the Federal Register; a tribal ordinance is drafted and approved by the National Indian Gaming Commission and notice published in the Federal Register; and practical steps carried out to implement any such gaming. Further, it argues that if the negotiations fail to result in a compact in sixty days, an even longer mediation process is required under § 2710(d)(7)(B). The sixty period was not imposed by this court but by Congress in § 2710(d)(7)(B)(iii) presumably to expedite the negotiating process.

In an analogous context, the Supreme Court has held that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). It also has been held in denying a motion to stay arbitration pending appeal of a decision granting a motion to compel arbitration that "the fact that an order to arbitrate imposes a cost, the cost of the arbitration, whether it is an opportunity cost of time or an out-of-pocket expense for lawyers or witness fees . . . does not show irreparable harm." *Graphic Communications Union v. Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir. 1985).

Here the order to enter negotiations would not result in irreparable harm to the State. If the cost of negotiating were held to be irreparable harm, all orders entered under § 2710(d)(7)(B)(iii) would be candidates for stay. This would be in apparent conflict with Congress' mandate that "the court shall order the State and the Indian Tribe to conclude . . . a compact within a 60-day period." Defendants have been on notice since at least April of 1989 that plaintiff wished to enter negotiations with respect to class III gaming and since this suit was filed that plaintiff sought an order

that the parties conclude a Tribal-State compact within sixty days of any order resolving the matter in its favor.[1]

Balancing the relevant factors, the court finds that defendants have not met their burden of establishing that a stay pending appeal is appropriate under these circumstances. However, given the asserted complexity of the negotiating process, the delay occasioned by this motion, and the relatively short duration of the sixty-day period, the final judgment will be modified as follows: the State and the Tribe are hereby ordered to conclude a Tribal-State compact within sixty (60) days of this ruling. 25 U.S.C. § 2710(d)(7)(B)(iii).

SO ORDERED.

Dated at Hartford, Connecticut, this 1st day of June, 1990.

/s/ Peter C. Dorsey
Peter C. Dorsey
United States District Judge

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[1] Although defendants have consistently argued that a tribal ordinance must be adopted before the obligation to negotiate arises and that the public policy of Connecticut forbids casino gambling, they did not specifically object to the sixty-day requirement or assert that it was not applicable in this instance.